No. 07-741

In the Supreme Court of the United States

DAVID A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951, is a "crime of violence" under 18 U.S.C. 924(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 501 F.3d 59.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. The petition for a writ of certiorari was filed on November 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to affect commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951 (Count 1); attempt to affect commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951 (Count 2); carrying a de-

structive device during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3); carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Count 4); possession of a destructive device by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 5); and possession of firearms by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 6). Pet. App. 7a; Judgment 1; Gov't C.A. Br. 3-4. He was sentenced to 460 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

1. In October 1997, an informant, Anthony Romano, alerted FBI agents that Carmello Merlino, his employer at TRC Auto-Electric, had suggested robbing the Loomis Fargo armored car facility in Easton, Massachusetts. Over the course of the following year, Romano continued to inform the agents about conversations with Merlino about plans for the robbery and reported that Merlino had asked him to recruit an insider to provide information about the Loomis Fargo facility. With Romano's cooperation, the FBI agents arranged a sting operation using an FBI agent as the insider. Pet. App. 2a-4a ; Gov't C.A. Br. 4-6.

Beginning in November 1998, Romano recorded numerous conversations with Merlino discussing the details of the robbery plan. Pet. App. 3a-4a; Gov't C.A. Br. 5-6. Merlino and Romano discussed possible accomplices for the robbery, and Merlino recommended petitioner, as well as Stephen Rosetti. Pet. App. 4a; Gov't C.A. Br. 6-8. In January 1999, petitioner attended two meetings with Merlino and Rosetti at which they extensively discussed the details of their plan for the robbery, including their intention to bring guns and grenades. Pet. App. 4a; Gov't C.A. Br. 7-8. Petitioner told the oth-

ers that they would "have it out" with the police if the police tried to stop them. *Id.* at 8.

On February 7, 1999, petitioner and his co-conspirators assembled at TRC to carry out the robbery plan. When petitioner and Rosetti approached TRC in Rosetti's car, Rosetti and petitioner drove around the area in a counter-surveillance pattern, then drove to a nearby condominium complex where petitioner's vehicle was parked. They unloaded several large duffle bags into petitioner's vehicle before driving back to TRC in Rosetti's car. After a brief chase, Rosetti and petitioner were arrested. The duffle bags in petitioner's vehicle contained a grenade, several semi-automatic handguns and an assault rifle, bullet proof vests, masks, and other equipment. Pet. App. 5a-6a; Gov't C.A. Br. 8; Indictment Count I, ¶¶ 7-8, Count IV.

2. Petitioner was charged with, *inter alia*, violating 18 U.S.C. 924(c) by carrying firearms, including a destructive device (namely, the grenade), "during and in relation to," and possessing firearms "in furtherance of," a "crime of violence," namely, a conspiracy to affect commerce by robbery in violation of the Hobbs Act. Section 924(c) defines the term "crime of violence" as "an offense that is a felony" and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 924(c)(3).

At trial, petitioner moved for judgments of acquittal on the Section 924(c) counts on the ground that conspiracy to commit a robbery in violation of the Hobbs Act is not a "crime of violence" within the meaning of Section 924(c)(3). The district court denied the motion. Gov't C.A. Br. 12-13. The jury found petitioner guilty on all counts. Pet. App. 7a.

The district court imposed a 30-year sentence on the Section 924(c) count that related to petitioner's carrying and possession of a "destructive device"—namely, a grenade. Judgment 2; see 18 U.S.C. 924(c)(1)(B)(ii) (prescribing 30-year mandatory minimum if firearm is a "destructive device"); 18 U.S.C. 921(a)(4)(A)(ii) (defining the term "destructive device" to include a grenade). The court imposed a concurrent five-year sentence on the Section 924(c) count that related to petitioner's carrying and possession of handguns and a rifle. Judgment 2. Finally, the court imposed concurrent sentences of 100 months on each of the remaining counts, to be served consecutively to the 30-year sentence on the Section 924(c) counts. *Ibid.* In total, petitioner was sentenced to 460 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3.

3. The court of appeals affirmed. Pet. App. 1a-27a. The court rejected petitioner's claim that a Hobbs Act robbery conspiracy cannot serve as a predicate "crime of violence" under Section 924(c)(1) because an overt act is not an element of such a conspiracy. *Id.* at 9a-12a. First, the court noted that "[t]he overwhelming weight of authority holds that a Hobbs Act conspiracy is a 'crime of violence' for purposes of Section 924(c)." *Id.* at 10a (citing cases). The court further noted circuit precedent holding that a conspiracy to commit a "crime of violence" is itself a "crime of violence" under the Bail Re-

form Act of 1984, 18 U.S.C. 3141 *et seq.*, which contains a similar definition of the term. Pet. App. 10a-11a (citing *United States* v. *Mitchell*, 23 F.3d 1 (1st Cir. 1994) (per curiam)); see 18 U.S.C. 3156(a)(4). The court concluded that the absence of an overt-act requirement does not change that analysis; in all cases, "the object of the conspiracy is the critical determinant of its nature." Pet. App. 11a.

The court of appeals rejected petitioner's argument that this authority was undermined by this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which held that the Florida offense of driving while intoxicated that causes serious bodily injury to another was not a "crime of violence" within the meaning of 18 U.S.C. 16, a statute that contains a definition of the term similar to the Section 924(c)(3) definition. Pet. App. 11a. The court noted that "the Court's rationale was that the Florida statute criminalized conduct that was merely accidental or negligent and thus not inherently 'violent,'" and that "[t]his is not the case with a Hobbs Act violation." *Ibid.* (citing *Leocal*, 543 U.S. at 8-10). The Court also noted that *Leocal* did not deal with inchoate offenses, and "thus has not undermined the conclusion that a conspiracy may qualify as a crime of violence." *Ibid.*

Finally, the court of appeals noted that, in *United States* v. *King*, 979 F.2d 801 (1992), the Tenth Circuit held that the crime of conspiracy under New Mexico law was not a "violent felony" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), where the conspiracy offense did not require proof of an overt act in furtherance of a particular underlying substantive offense. Pet. App. 12a; see *King*, 979 F.2d at 802. The court declined to follow *King* because it "does not consider the importance of the object of the conspir-

acy, which under our case law is a critical inquiry." Pet. App. 12a.

ARGUMENT

Petitioner renews his contention (Pet. 5-15) that a Hobbs Act conspiracy to affect commerce by robbery under 18 U.S.C. 1951 does not qualify as a "crime of violence" under 18 U.S.C. 924(c). The court of appeals correctly rejected that contention, and further review is unwarranted.

1. The court of appeals in this case correctly concluded that a conspiracy to commit a robbery in violation of the Hobbs Act qualifies as a "crime of violence" for purposes of Section 924(c).

a. The Hobbs Act prescribes criminal penalties for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery[,] * * * or attempts or conspires so to do." 18 U.S.C. 1951(a). The Hobbs Act defines "robbery" as the unlawful taking or obtaining of personal property from a person against his will,

> by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

18 U.S.C. 1951(b)(1). Thus, a Hobbs Act robbery conspiracy is "by definition a conspiracy that involves a substantial risk that physical force may be used against the person or property of another" and therefore qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(B). *United States* v. *Elder*, 88 F.3d 127, 129 (2d Cir. 1996) (per curiam); accord *United States* v. *Taylor*, 176 F.3d

331, 337-338 (6th Cir. 1999); *United States* v. *Phan*, 121 F.3d 149, 152-153 & n.7 (4th Cir. 1997), cert. denied, 522 U.S. 1109 (1998); *United States* v. *Mendez*, 992 F.2d 1488, 1491-1492 (9th Cir.), cert. denied, 510 U.S. 896 (1993).

b. Petitioner contends (Pet. 8-9, 11-15) that the court of appeals "erred in considering the object of the conspiracy to conclude that a Hobbs Act conspiracy constitutes a crime of violence," for four reasons: (1) because the conspiracy may be abandoned; (2) because a prosecution for conspiracy under the Hobbs Act requires no proof of an overt act that would tie the conspiracy to the underlying substantive offense; (3) because there is no risk that force will be used "in the course of committing" a Hobbs Act robbery conspiracy, 18 U.S.C. 924(c)(3)(B); and (4) because the conduct encompassed by the elements of Hobbs Act conspiracy does not categorically present a substantial risk that physical force will be used. Each of these contentions lacks merit.

First, although it is possible that a conspiracy may be abandoned before its object has been achieved, the offense of conspiracy is, by its nature, substantially likely to lead to commission of a substantive criminal offense. Conspiracy is a criminal offense precisely because "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961); accord *United States* v. *Jimenez Recio*, 537 U.S. 270, 275 (2003). When the object of the conspiracy involves the use of "actual or threatened force, of violence, or fear of injury," as under the Hobbs Act, 18 U.S.C. 1951(b)(1), the conspiracy itself creates "a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3).

Second, that the Hobbs Act does not contain an overt act requirement does not mean, as petitioner suggests, that "there is no basis to consider the underlying substantive offense to determine if a substantial risk exists that force will be used in committing the conspiracy offense." Pet. 12; see also *ibid.* (citing *United States* v. *Brown*, 200 F.3d 700 (10th Cir. 1999), cert. denied, 528 U.S. 1178, and 529 U.S. 1081 (2000)). A prosecution under the Hobbs Act for conspiracy to commit robbery necessarily "invites consideration of the underlying substantive offense," *Brown*, 200 F.3d at 706, because the conspiracy is defined by its object: "the unlawful taking or obtaining of personal property * * * by means of actual or threatened force, or violence, or fear of injury." 18 U.S.C. 1951(a) and (b)(1).

Third, contrary to petitioner's argument (Pet. 13-14), conspiracy to commit robbery in violation of the Hobbs Act involves a substantial risk that physical force may be used "in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). The crime of conspiracy does not end when an unlawful agreement is reached. Rather, conspiracy is a continuing offense that does not terminate until it has succeeded or the conspiracy has been abandoned. *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); see *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946) (citing *Hyde* v. *United States*, 225 U.S. 347, 369 (1912)). There is thus a substantial risk that physical force may be used "in the course of committing the offense" of conspiring to take the personal property of another by force, violence, or fear of injury.

Finally, as petitioner notes (Pet. 14), whether a Hobbs Act robbery conspiracy is a "crime of violence" under Section 924(c)(3)(B) must be determined as a categorical matter, focusing on "the *elements of the offense*," rather than "the specific conduct of this particular offender." *James* v. *United States*, 127 S. Ct. 1586, 1593-1594 (2007); cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004) (stating that the nearly identical language of 18 U.S.C. 16(b) "requires us to look to the elements and the nature of the conviction, rather than to the particular facts relating to petitioner's crime"). But the elements of the offense of which petitioner was convicted are not merely, as petitioner contends (Pet. 14-15), "an agreement." Rather, they are an agreement *to use or threaten physical force, violence, or fear of injury to take the personal property of another.* 18 U.S.C. 1951(a) and (b)(1). For the reasons explained above, that is conduct that, by its nature, involves a "substantial risk that physical force * * * may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

c. Petitioner also purports (Pet. 15) to find support for his position in the legislative history of the statute. Two of the bills he cites, however—S. 52, 98th Cong., 2d Sess. § 2 (1984) (as passed by the Senate), and S. 1688, 97th Cong., 2d Sess. § 2 (1982) (as passed by the Senate)—are unenacted proposals relating to the definition of "violent felony" in Section 924(e), and not the definition of "crime of violence" in Section 924(c). See *James*, 127 S. Ct. at 1593 (discussing S. 52); *United States* v. *Strahl*, 958 F. 2d 980, 986 (10th Cir. 1992) (discussing S. 52 and S. 1688). And the third bill petitioner cites did not, as petitioner contends (Pet. 15), propose amending the definition of "crime of violence" in Section 924(c)(3) to include conspiracy as a predicate offense. Rather,

that unenacted bill proposed expanding the prohibitions in Section 924(c)(1)(A) on using, carrying, or possessing firearms to include *conspiring* to use, carry, or possess firearms in the circumstances prohibited by the statute. S. 155, 109th Cong., 1st Sess. § 209(a)(1) (2005).

2. Petitioner claims (Pet. 5) that this Court's review is warranted because the courts of appeals are divided on the question "whether a conspiracy that does not require proof of an overt act can qualify as a 'crime of violence.'" Petitioner's contention is incorrect.

Like the court of appeals in this case, the Second, Fourth, Sixth, and Ninth Circuits have held that a Hobbs Act robbery conspiracy qualifies as a "crime of violence" under Section 924(c). See *Taylor*, 176 F.3d at 337-338; *Phan*, 121 F.3d at 152-153 & n.7; *Elder*, 88 F.3d at 128-129; *Mendez*, 992 F.2d at 1491-1492.

The Tenth Circuit has not considered whether a Hobbs Act conspiracy qualifies as a "crime of violence" under Section 924(c), and any tension with the Tenth Circuit's decision in *United States* v. *King*, 979 F.2d 801 (1992), does not warrant review. In *King*, the Tenth Circuit held that a conspiracy to commit a violent felony in violation of New Mexico state law was not a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B).[1] 979

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[1] The definition of "violent felony" under the ACCA differs in significant respects from the definition of "crime of violence" in Section 924(c)(3). Under the ACCA, a "violent felony" is "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The definition of "crime of violence" under

F.2d at 802-803. *King*'s reasoning is not altogether clear, but the court appeared to hold that the elements of a New Mexico conspiracy, which did not require proof of an overt act, see *id.* at 802, did not "necessarily present circumstances which create the high risk of violent confrontation inherent in a completed" crime, *id.* at 804 (quoting *Strahl*, 958 F.2d at 986).

Subsequently, in *Brown*, the Tenth Circuit distinguished *King* in holding that conspiracy to commit carjacking, in violation of 18 U.S.C. 371, qualifies as a "violent felony" under the ACCA. 200 F.3d at 706. The court in *Brown* focused on the need for proof of an overt act under Section 371, in contrast to the statute in *King*, but also recognized that "at a minimum, an agreement to accomplish the statutory elements of carjacking necessarily involves a substantial risk of physical force against the person or property of a victim." *Ibid.* More recently, the court reviewed its decisions in *King* and *Brown* and concluded that it need not directly apply those decisions because this Court has "recently provided the federal courts with a new framework applicable to the question whether a prior conviction for an inchoate crime qualifies as a violent felony under the ACCA." *United States* v. *Fell*, No. 06-1438, 2007 WL

Section 924(c)(3) does not contain a comparable provision for crimes that are not defined in terms of the use of force, but involve conduct that "presents a serious potential risk of physical injury" to others. Cf. 18 U.S.C. 924(c)(3)(B); *Leocal*, 543 U.S. at 10 n.7 (comparing 18 U.S.C. 16(b), which contains the same operative language as 18 U.S.C. 924(c)(3)(B), and Sentencing Guidelines § 4B1.2(a)(2), which contains the same operative language as 18 U.S.C. 924(e)(2)(B)(ii)). On the other hand, the definition of "crime of violence" under Section 924(c)(3), unlike the definition of "violent felony" under the ACCA, includes offenses involving the use of force, or a substantial risk that force will be used, against *property*, as well as against persons.

4395444, at *4 (10th Cir. Dec. 18, 2007) (citing *James* v. *United States*, *supra*). Applying *James*, the court of appeals concluded that a Colorado conspiracy to commit a second degree burglary, which requires proof of an overt act, was not a violent felony under the ACCA's residual clause. *Id.* at *9 (concluding that the criminal conduct in a burglary conspiracy will not necessarily increase the likelihood that the conspirators will come near the building or otherwise engage in acts posing a risk of physical harm to persons). The court's decision in *Fell* makes clear that review is not warranted based on a purported conflict between *King* and the approach taken by the First Circuit to Hobbs Act conspiracies under Section 924(c). The Tenth Circuit no longer regards an overt-act requirement as the litmus test for whether the underlying conduct in a conspiracy may be considered; rather, the crime must simply be judged by the risks that it entails. At least until the Tenth Circuit has the opportunity to consider the applicability of *Fell*'s analysis in the context of a Hobbs Act robbery conspiracy, this Court's intervention would be premature.

3. Finally, petitioner contends (Pet. 9-11) that this case presents a question this Court reserved in its decision in *James*. That contention is also incorrect.

In *James*, this Court held that attempted burglary under Florida law was a "violent felony" under the ACCA because it involved "conduct that present[ed] a serious potential risk of physical injury to another" within the meaning of 18 U.S.C. 924(e)(2)(B)(ii). 127 S. Ct. at 1594-1596. In reaching that conclusion, the Court emphasized that Florida law required an overt act directed toward entering or remaining in a structure or conveyance, and not merely preparatory activity, to establish attempted burglary. *Id.* at 1594. The Court rea-

soned that, in those circumstances, attempted burglary posed the same kind of risk as a completed burglary: the risk that "an innocent person might appear while the crime is in progress," and that a violent confrontation might ensue. *Id.* at 1595. "Given that Florida law, as interpreted by that State's highest court, require[d] an overt act directed toward the entry of a structure," the Court noted that it "need not consider whether the more attenuated conduct" encompassed by attempt laws satisfied by preparatory conduct "presents a potential risk of serious injury under the ACCA." *Id.* at 1596.

This case presents no opportunity for this Court to consider that question. This case, unlike *James*, concerns the definition of "crime of violence" under Section 924(c), and not the definition of "violent felony" under the ACCA; it involves a conspiracy offense, which is an offense that continues until the conspiracy succeeds or is abandoned, and not an attempt offense that can be established by mere preparatory conduct; and the relevant substantive offense at issue is one that has as an element the use, attempted use, or threatened use of physical force, rather than merely raising a possibility that physical force might be used in the course of committing the offense.[2]

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[2] For similar reasons, this case need not be held for *Begay* v. *United States*, No. 06-11543 (argued Jan. 15, 2008). The analysis of whether felony driving while intoxicated qualifies a "violent felony" under the ACCA entails questions that are quite distinct from whether the agreement to commit robbery qualifies as a "crime of violence" under 18 U.S.C. 924(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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